In the High Court of Punjab and Haryana at Chandigarh.

Regular Second Appeal No.1870 of 2005.

Date of decision:17.11.2006.

Rajinder Singh and others.

...Appellants.

Versus

Pirthi and others.

...Respondents.

...

Coram: Hon'ble Mr. Justice S. N.Aggarwal.

...

Present: Mr. Vikram Singh Advocate for the appellants.

Mr.R.S.Tacoria, Advocate for the respondents.

...

Judgment.

S. N. Aggarwal, J.

Nagina, respondent No.3 was the owner of land comprised in Khewat No.64, Khatauni No.203, Killa No.31//7(8-0), 8(8-0), 9(8-0), 10/1 (1-16), 13/2 (6-8), as per Jamabandi for the year 1981-82. Out of this land, Nagina sold Killa No.341//8 (8-0), 99(8-0),10/1(1-10) and 13/2 (6-8) to Pirthi and Harkesh respondents vide sale deed dated 7.7.1988 for which mutation No.815 was sanctioned on 5.9.1988. Subsequently, Nagina respondent sold Killa No.31//7 (8-0) of Khewat No.64, Khatauni No.203 in favour of Maan Singh (now deceased)

(predecessor-in-interest of the appellants) vide sale deed 25.4.1989 for a sum of Rs.70,000/-. 1/4th share in tubewell, electric motor etc. was also sold along with it.

On this, Pirthi and Harkesh respondents filed a suit for possession by way of pre-emption as co-sharers. Maan Singh (predecessor-in-interest of the appellants) had filed written statement and contested the suit. Additional objections were also pleaded.

Issues were framed by the learned trial Court.

In support of their case, Pirthi appeared as PW-1. He also proved copy of the Jamabandi for the year 1981-82, Exhibit P-1, copy of mutation No.815 mark B and closed the evidence.

On the other hand, the appellants examined Mahavir Gupta,Deed Writer as DW-1, Maan Singh defendant himself appeared as DW-2. Desh Raj attesting witness of the sale deed appeared as DW-3. The sale deed was also proved. A copy of the Jamabandi and copies of Khasra Girdawaries were also proved.

` On the basis of this evidence, and the Full Bench judgment of this Court reported as **Bhartu Versus Ram Sarup,** 1981 PLJ 204 the learned trial Court held that Pirthi and Harkesh respondents had become co-sharers with Nagina. Accordingly, the suit of respondent Nos.1 and 2 was decreed by the learned trial Court vide judgment and decree dated 25.2.1991.

Maan Singh filed an appeal. In the meantime, the law of pre-emption was repealed and the learned Lower Appellate Court

accepted the appeal vide judgment dated 25.8.1995 on the basis of amended law of pre-emption. Pirthi and Harkesh filed Regular Second Appeal No.2426 of 1995 in this Court which was accepted vide order dated 7.12.2004,relying upon the judgment of the Hon'ble Supreme Court reported as **Shyam Sundar and others Versus Raj Kumar and another,** AIR 2001 SC 2472. The matter was remanded by this Court to the learned Lower Appellate Court with the direction to decide the appeal on merits. The learned Lower Appellate Court up-held the judgment of the learned trial Court and dismissed the appeal vide judgment and decree dated 31.3.2005.

Hence, the present appeal.

The submission of learned counsel for appellants was that Nagina was the exclusive owner of the land. He had sold specific khasra numbers to Pirthi and Harkesh respondents and by the said sale deed, Pirthi and Harkesh had become exclusive owners of those khasra numbers which were sold to them by Nagina. Nagina had remained the exclusive owner of the remaining land which was subsequently sold by him to Mann Singh vide sale deed dated 25.4.1989. Since respondent Nos.1 and 2 were not co-sharers with Nagina, therefore, these respondents have no right of pre-emption. It was also submitted that the judgment of Hon'ble Full Bench in **Bhartu's** case relied upon by the learned counsel for the respondent Nos.1 and 2 does not apply to the facts of the present case.

On the other hand, the submission of learned counsel for

respondent Nos.1 and 2 was that since they had purchased the land from Nagina out of same khewat number and out of same Rectangle number,therefore, they had become co-sharers with Nagina and the case is squarely covered by the judgment in **Bhartu's** casem (supra).

After considering the submissions advanced before me, the following substantial questions of law arise:-

1. Whether Nagina was the exclusive owner?

2.Whether Pirthi and Harkesh became co-sharers with Nagina after purchasing specific khasra numbers from Nagina because khewat number/killa number were joint between them?

It is the admitted case of the appellants as also of the respondents that Nagina, was the exclusive owner of Khewat No.64, Khatauni No.203, Killa Nos.32//7,8,9,10/1 and 13/2. He was not a co-sharer with anybody else. In the jamabandi for the year 1981-82, Exhibit P-1, Nagina is shown to be co-owner with his mother and sister but reference has also been made to mutation No. 755 for change in ownership. However, in the jamabandi for the year 1986-87 Exhibit P-2 Nagina alone has been shown to be the owner of the land purchased by respondents Nos. 1 and 2 vide sale deed dated 7.7.1988 and of the land purchased by Maan Singh vide sale deed dated 25.4.1989. It is, therefore, held that Nagina was the exclusive owner of this land.

The submission of learned counsel for the respondents was that after purchasing the suit property from Nagina vide sale deed dated 7.7.1988, they had become co-sharers with Nagina. They were joint

owners in the same Khewat and in the same Rectangle although their khasra numbers were separate. Reliance was placed on the judgment of the Hon'ble Full Bench in **Bhartu's** case (supra).

This submission has been considered. It has no merits at all. The facts in **Bhartu's** case were entirely different. In **Bhartu's** case, the vendor was a joint owner and a co-sharer. Moreover, the vendor had sold 21 square yards out of land measuring 4 Kanals 2 Marlas comprised in one khasra number. The right of seeking partition had become available to the vendee and,therefore, the Hon'ble Judges of the Full Bench were pleased to hold that the vendor will sell only that right which he had in the suit land. If the vendor was the exclusive owner, he would confer rights of exclusive ownership on the land sold but if he was a joint owner/co-sharer, then he would confer rights of joint ownership on the vendee. Their Lordships were pleased to observe in para No.5 of the judgment as under:-

> "The rights of a transferee from a co-owner are not entirely dependent on judicial decisions but are regulated by section 44 of the Transfer of Property Act which provides that where one or two or more co-owners of the immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of

the property, and to enforce a partition of the same but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred. According to this statutory provision also what transferee gets is the right of the transferor to joint possession and to enforce a partition of the same irrespective of the fact whether the property sold is fractional share or specified portion, exclusively in possession of the transferor. Again, it cannot be disputed that when a co-sharer is in exclusive possession of the specified portion of the joint holding, he is in possession thereof as a co-sharer and all the other co-sharers continue to be in its constructive possession. By the transfer of that land by one co-owner, can it be said that other co-sharers cease to be co-sharers in that land or to be in its constructive possession. The answer obviously would be in the negative because any of the other co-sharers can either seek a declaration from the Court as held in Sukh Dev's case (supra) that the vendee is in possession only as a co-sharer or can initiate proceedings for partition of the joint holding including the land transferred. If the other co-sharers continue to be co-sharers in the land transferred even though comprised of specific khasra numbers how can it be said that what is sold is something other than the share out of the joint holding. That the sale of specific portion of

land out of joint holding by one of the co-owners is nothing but a sale of a share out of the joint holding,would be further elucidated if we take the example of a sale where a co-owner sells the land comprised of a particular khasra number which is not in his possession but is within his share in the joint holding".

From the facts of that case and from the observations made by their Lordships of the Hon'ble Full Bench reproduced above, it is clear that the ratio of law laid down in **Bhartu's** case is not applicable to the facts of the present case.

The learned counsel for the respondents also submitted that the judgment of this Court reported as **Suraj Ram Versus Birbal and others,** 2001(2) Punjab Law Reporter 229 is applicable to the facts of this case. This judgment is again different on facts. In **Suraj Ram's** case, the sale was made by co-owners, but in the present case, the sale has been made by exclusive owner. Therefore, even that case would not apply to the facts of the present case.

Rather, the facts of this case are more similar to the facts of the judgment reported as **Inder Singh and others versus Om Parkash and others, 1989 P.L.J.754** as is clear from para No.2 of the judgment which reads as under:-

"The undisputed facts are: Vas Dev was owner of land measuring 34 kanals 2 marlas comprised in Khewat No.240/327, Khatoni No.395, Rectangle No.133, Killa

Nos.5,6,15 and Rectangle No.134, Killa Nos.10 and 11 as entered in Jamabandi Ex.P3 for the year 1981-82. He transferred the land measuring 19 kanals 4 marlas comprised in Khewat No.240/237, Khatoni No.395, Rectangle No.133, Killa Nos.5(4-16), 6(6-18) and 15(7-10) vide sale deed dated January 18,1984 to Om Parkash and others (hereinafter referred to as the plaintiffs) and vide sale deed dated May 17,1985, he sold the land measuring 14 kanals 18 marlas comprised in Khewat No.240, Khatauni No.395, Rectangle No.134, Killa Nos.10(8-0) and 11(6-18) to Inder Singh and others (hereinafter referred to as the vendees)."

Dealing with the law of pre-emption, it was observed by this Court in **Inder Singh's case** (supra) as under:-

"A co-sharer is the person, who has share in the community of interest whether the same is fixed or flexible along with others in a joint property held by them all. When land or property belongs to two or more persons jointly and is undivided,each of them is a co-sharer with the other in the joint property. The concept of joint property used in Section 15(1)(b) of the Act, presupposes that it belongs to a person or persons other than the vendor. In the instant case, Vas Dev was the sole owner of land measuring 34 kanals 2 marlas. He transferred specified field numbers in Rectangle

No.133 Killa Nos.5(4-16), 6(6-18) and 15(7-10) to the plaintiffs vide sale deed dated January 18,1984 and put them in possession thereof. He was also owner of another Rectangle No.134 bearing separate Killa numbers, namely 10(8-) and 11(6-18) and transferred the same to the vendees vide sale deed dated May,17,1985. The purchaser of a share of specified Killa numbers in specified Rectangle will not become a co-sharer in the Khewat. The plaintiffs did not purchase an undivided share of the joint land. Khata is equivalent to a Khewat and in the matter of finding out for the exercise of preferential right of pre-emption, the status of the party as a co-sharer has to be seen in a Khata or Khewat. In the present case, the plaintiffs are purchasers of specified field numbers in specified Rectangle only and not in the whole joint land and they will not become co-sharers in the Khewat or Khata. The word 'co-sharer' in the context of pre-emption law denotes a person who holds a share or shares in the whole of the property or properties of which another share or other shares were the subject-matter of sale. The plaintiffs will thus not become co-sharers."

In the present case, Nagina was the exclusive owner. He had sold specific khasra numbers to respondent Nos.1 and 2 and conferred rights of exclusive ownership of those khasra numbers on respondent Nos.1 and 2. The respondents did not get any right of

partition with Nagina. It may be that Khewat was the same or Rectangle was the same but it does not make respondent Nos.1 and 2 to be joint owners or co-sharers with Nagina who was the exclusive owner of some land out of which he sold specific part of the land to the respondents by specific khasra numbers. If Nagina had sold half share in the land owned by him to respondents No. 1 and 2 then these vendees would have become co-sharers and they would have acquired a right to seek partition with Nagina. But since Nagina had sold specific khasra numbers to respondent Nos.1 and 2, he had conferred full rights of ownership of those khasra numbers. The khewat and khatauni numbers would have been changed in the next Jamabandi after the sale to respondent Nos.1 and 2 and therefore, respondent Nos.1 and 2 cannot claim to be the joint owners or co-sharers with Nagina merely because the khewat or the Rectangle was the same as they had purchased specific khasra numbers and exclusive ownership was conferred on them with regard to those khasra number by Nagina. This Court is, therefore, of the opinion that by purchasing specific khasra numbers vide sale deed dated 7.7.1988, respondent Nos.1 and 2 had not become co-sharers with Nagina. They had no right to seek partition from Nagina as they had become exclusive owners with regard to those khasra numbers irrespective of the fact that the Khewat or the Rectangle number was the same between the land of Nagina and of the land purchased by respondent Nos.1 and 2 and Nagina remained the exclusive owner of the unsold land.

Since respondent Nos.1 and 2 were not co-sharers or joint owners or co-owners with Nagina vendor of the land left with Nagina, therefore, they did not acquire any right of pre-emption with regard to subsequent sale made by Nagina in favour of the appellants.

Accordingly, it is held that the judgments passed by the learned Lower Courts are based on the wrong interpretation of law and deserve to be set aside. These judgments are accordingly set aside. This appeal is accepted and the suit filed by respondent Nos.1 and 2 for pre-emption stands dismissed.

November 17,2006. (S. N. Aggarwal)
Jaggi Judge